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OFFICE OF PETITIONS

In re Application of :
Tetsuo Nishimoto :
Application No. 10/013,096 : DECISION DISMISSING
Filed: 6 December, 2001 : PETITION
Attorney Docket No. 393032029100 :

This is a decision on the petition filed on 3 September, 2002, requesting that the above-identified application be accorded a filing date of 7 December, 2001, instead of the presently accorded filing date of 6 December, 2001.

The petition is **DISMISSED**.

Petitioner requests the later filing date on the basis that the application was purportedly deposited in Express Mail service on 7 December, 2001, pursuant to the requirements of 37 CFR 1.10. Petitioner states that the date of deposit on the Express Mail label is incorrect. In support, the petition is accompanied by a receipt from the USPS dated 12/07/01 at 4:17 pm showing that postage was paid for an "Express Mail Post Office to Addressee" and listing Express Mail tracking number EL824966934US, the same tracking number contained on the transmittal sheet and Express Mail mailing label for the present application located in the official file.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be

accorded the Office receipt date as the filing date.¹
(emphasis added)

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

The petition lacks the showing required by item (3) above. The instant petition is not supported by corroborating evidence showing that the correspondence was deposited as Express Mail prior to the last scheduled pickup on the requested filing date.

The receipt showing the time and date that the postage fee for the above-referenced Express Mail number was charged to petitioner's USPS corporate account is insufficient to show the time and date of deposit in Express Mail service. It is noted

¹See 37 CFR 1.6(a).

that the postage shows a 7 December, 2001 date thereon. However, the date on which postage was applied to an Express Mail package does not establish the date the package was deposited with the USPS.

Any renewed petition should be accompanied by evidence from the USPS establishing the date the application was deposited as Express Mail (e.g., Express Mail Corporate Account Mailing Statement or a letter from the USPS showing the date the application was accepted in Express Mail service).

Alternatively, petitioners may provide evidence that came into being after deposit and within one business day of deposit (e.g. a log book with an entry after mailing, or a letter to the client sent after the Express Mail package was mailed.

Petitioners should also note that there is no provision in the rules for a certificate of mailing by "Express Mail".² In accordance with 37 CFR 1.10(d)(3), the Express Mail certificate of mailing may not serve as evidence of timely mailing because it was created prior to the deposit of the application in Express Mail.

As the petition is not accompanied by corroborating evidence required by the rule, the petition is dismissed.

No petition fee is due and none has been charged.

Any request for reconsideration (no further petition fee is required) must be filed within TWO MONTHS of the date of this decision in order to be considered timely [37 CFR 1.181(f)]. The request should be addressed as follows:

By mail: Assistant Commissioner for Patents
 Box DAC
 Washington, D.C. 20231

By FAX: (703) 308-6916
 Attn: Office of Petitions

By hand: Crystal Plaza 4
 Room 3-C23
 2201 South Clark Place
 Arlington, VA 22202

²See 1174 O.G. Pat. Of. 92 (May 16, 1995).

The application is being forwarded to Technology Center 3700 for examination in due course with the presently accorded filing date of 6 December, 2001.

Telephone inquiries may be directed to the undersigned at 703-308-6918.



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